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No. 97-1929

In The

Supreme Court of the United States

October Term, 1997

STATE OF MONTANA; LAKE COUNTY, MONTANA; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation,

Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency; CONFEDERATED SALISH and KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF MONTANA ASSOCIATION OF COUNTIES (MACO) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE TRIBE POSSESSES THE INHERENT SOVEREIGN AUTHORITY TO REGULATE FEE PROPERTY OWNED BY NONMEMBERS UNDER THE CLEAN WATER ACT?

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY MONTANA ASSOCIATION OF COUNTIES (MACO) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Comes now the Montana Association of Counties (hereinafter MACO) and respectfully moves this Court for leave to file an Amicus Curiae brief in support of Petitioner's Petition for Writ of Certiorari.[1] MACO makes the aforementioned Motion pursuant to Rule 37 of the United States Supreme Court Rules.

MACO represents all of the Counties of Montana. Montana has seven federally recognized Reservations within its boundaries. At least 20 of the 56 Counties in Montana either border a Reservation or have property lying within a Reservation.

Lake County currently holds a membership in MACO. Approximately three-fourths of Lake County consists of the Salish Kootenai Reservation. The Reservation also lies in parts of Missoula, Flathead and Sanders Counties. All of these Counties hold a membership in MACO.

The issue presented in this case directly impacts twenty of the member Counties of MACO. The issue of

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[1] The Environmental Protection Agency has consented to the filing of this brief. The Confederated Salish Kootenai Tribes have not consented to the filing of this brief necessitating a motion pursuant to Rule 37 of the Supreme Court Rules. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

water regulation effects the services provided by these member Counties, their property and the citizens of the member Counties.

MACO is familiar with issues in Indian Law. MACO recently sponsored an Amicus Curiae Brief in the case *South Dakota v. Yankton Sioux Tribe*, ___ U.S.___, 118 S.Ct. 1381 (1998). MACO sponsored an Amicus Curiae Brief in the case at hand before the Ninth Circuit Court of Appeals.

Because this case directly effects the member counties of MACO, and because of MACO's familiarity with the principles of Indian law, MACO believes it can provide a fresh outlook and argument that will assist this Court in its decision.

Counsel for MACO has contacted counsel for the United States Environmental Protection Agency, the United States Attorney, Sherry Scheel Matteucci, and she has not consented to MACO's filing of this brief.

Counsel for MACO also contacted counsel for the Confederated Salish and Kootenai Tribes. The Confederated Salish and Kootenai Tribes declined their consent.

Dated this 29th day of June, 1998.

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INTEREST OF THE AMICI MONTANA ASSOCIATION OF COUNTIES

The Montana Association of Counties (hereinafter MACO) represents all fifty-six Counties in Montana including Lake County. Twenty of these Counties either border or have part of their territory lying within one of the seven Reservations in Montana. The Ninth Circuit decision directly impacts twenty of MACO's members. These twenty members provide a substantial majority of the services to their citizens, both Tribal members and nonmembers. Unless reviewed and overturned, Tribal regulation will force these twenty members to allocate sparse tax dollars in order to comply with Tribal water quality standards. As a representative of these twenty members, MACO has a duty to voice their interests and concerns.

STATEMENT OF THE CASE

Amici curiae adopts the Statement of the Case set forth in the Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

This Court should grant a Writ of Certiorari when the Ninth Circuit erred in finding the Tribe possesses the inherent sovereign authority to regulate Montana, local governments and their nonmember citizens under the Clean Water Act (hereinafter CWA). The Ninth Circuit impermissibly found the second exception of *Montana v.*

United States, 450 U.S. 544 (1981), circumvented the general rule. The Ninth Circuit ignored this Court's instruction requiring the second exception to trigger only when the Tribal regulation of nonmembers bears a clear relationship to tribal self-government or its internal relations. State regulation of nonmembers on fee land will prevent any impact to the Tribe's ability to govern its members and trust land. State regulation will prevent nonmembers from invading the internal relations of the Tribe.

As presently construed by the EPA, the CWA empowers the Tribe to designate water uses for all waters on the reservation, and to set Water Quality Standards (hereinafter WQS) to achieve the designated uses. The Tribe must certify any permit issued by the EPA, insuring that it meets tribal WQS. Challengers to tribal use designations, WQS, or denials of certification must initiate actions in Tribal court using Tribal law.

Local governments provide the essential services to the entire populace of the Reservation. These governments have a strong interest in regulating the services they provide. Under the EPA's approach, the local governments will have no voice in the regulation of these services.

Nonmembers are subject to laws and courts and a legislative body they have no role in selecting or defining. Sovereign immunity and no constitutional rights in Tribal court, make the EPA's approach unsuitable for nonmembers.

Finally, this Court should grant certiorari when the principle of sovereign immunity causes unworkable enforcement of the CWA. Both the Tribe and the State

possess sovereign immunity from suit in each other's court. The Tribe cannot enforce its regulations against State and local governments in Tribal Court. State and local governments cannot challenge a Tribal decision under the CWA without foregoing their sovereign immunity. Such hurdles require review by this Court.

I. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI WHEN THE NINTH CIRCUIT ERRED IN FINDING AN INDIAN TRIBE POSSESSES THE INHERENT SOVEREIGN AUTHORITY TO REGULATE STATE OR LOCAL GOVERNMENTS AND THEIR CITIZENS.

The Ninth Circuit Court of Appeals upheld a determination by the EPA permitting Indian Tribes to regulate fee property owned by state and local governments and their nonmember citizens. *Montana v. United States Environmental Protection Agency*, 137 F.3d 1135 (9th Cir. 1998). The EPA made this decision by giving lip service to the *Montana v. United States, supra,* general rule. The EPA permitted the second exception fueled by its generalized findings to circumvent the general rule. A Tribe need only assert the following three phrases:

> 1) there are waters within the reservation used by the tribe; 2) the waters and critical habitat are subject to protection under CWA; and 3) impairment of waters **would have a serious and substantial effect on the health and welfare of the tribe.**

Id. at 1139. By saying these magic words, Tribes may regulate all fee land owned by the State, local governments, and nonmembers within a reservation. With the

magic words, the Ninth Circuit subjected nonconsenting State and local governments and their nonmember citizens to regulation by a foreign nation utilizing their rules. This Court should issue a Writ of Certiorari because the Ninth Circuit erred in its interpretation of the *Montana, supra,* test. Without any factual basis, the Ninth Circuit permitted the second exception to *Montana, supra,* to completely circumvent the general rule.

This Court should also issue a Writ of Certiorari, when the local governments and their nonmember citizens must immediately face tribal regulation. If this Court fails to issue a Writ, the governmental entities, the service providers, must invest money and time in order to comply with the new tribal regulations until this Court finally decides the extent of the second exception of *Montana, supra.*

A. THE NINTH CIRCUIT ERRED WHEN IT CIRCUMVENTED THE GENERAL RULE IN *MONTANA* WITH THE SECOND EXCEPTION.

In *Montana v. United States, supra,* this Court found as a general rule that the inherent sovereign powers of an Indian Tribe do not extend to the activities of nonmembers. *Montana v. United States, supra,* and *Strate v. A-1 Contractors,* 117 S.Ct. 1404, 1409 (1997). The general rule means a tribe "has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land." Plurality of White, Rehnquist, Scalia and Kennedy *Brendale v. Confederated Tribes and Bands of the Yakima Nation,* 492 U.S. 408, 430 (1989). Of course, the *Montana* court qualified the rule by stating:

> [1] To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe of its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee*, 358 U.S. 217, 233 (1959). [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, supra, at 565-566.

In construing the second exception, *Strate,* stated:

> Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations."

Strate, supra, at 1416 quoting *Montana, supra,* at 564. The Tribal regulation over nonmembers must bear a clear relationship to tribal self-government or its internal relations. *Montana, supra,* at 564-565.

In "reality", Tribes lack any inherent sovereignty to regulate nonmembers after *Montana, supra. South Dakota v. Bourland,* 508 U.S. 679, 695 n. 15 (1993). In the event

nonmember activities on fee land threaten the political integrity, economic security or health or welfare of the Tribe, the Tribe must bring an action under federal law and not in Tribal Court. *Brendale, supra,* 430-431. The Supremacy clause requires the state and local governments to recognize and respect the Tribe's interests and regulate activities accordingly. Id. at 431.

Montana, Brendale, Bourland, and *Strate, supra,* demand a narrow reading of the second exception limiting its application to activities that seriously threaten tribal self-governance, its own members, or the Tribe's internal relations. Under such a threat an aggrieved party must bring the action under federal law outside of the Tribal courts. The Ninth Circuit ignored the instructions of this Court and refused to examine water regulation to see if the State and local governments have allowed the activities of nonmembers to threaten Tribal self governance or the internal relations of the Tribe.

If the Ninth Circuit had reviewed this case properly the Court would have discovered that the State of Montana has traditionally regulated nonmember fee land including water. Montana possesses an intricate regulatory system to protect the water quality of all waters within the State of Montana. See Mont. Code Ann. Section 75-5-101 (1997) et seq.[2] The Montana Constitution

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[2] The Montana legislature stated:

> It is the public policy of this state to: (1) conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation, and other beneficial uses; (2) provide a comprehensive program for the prevention,

provides every citizen with "the right to a clean and healthful environment." Mont. Const. of 1972, Art. II, Section 3 (1972). The Montana Legislature has a constitutional duty to prevent degradation of Montana's natural resources. Mont. Const. of 1972, Art. IX, Section 1 (1972).

State regulation of nonmember fee land does not prevent Tribal regulation of trust land and of Tribal members. The Tribe may freely pass laws to regulate all water on trust land and on land owned by Tribal members.

State regulation of nonmembers does not impermissibly invade in the internal relations of the Tribe. The *Montana, supra,* Court did not find state regulation to be intrusive on the internal relations of the Tribe. State regulation of water on nonmember fee land does not permeate the internal relations of a Tribe any more than State regulation of nonmember hunting and fishing.

Under State regulation, nonmember activities involving water use will not impact the Tribe's self-governance or their internal relations. Montana's water quality regulations provide severe civil and criminal penalties which will insure compliance with Montana's policy of nondegradation.[3]

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abatement, and control of water pollution. Mont. Code Ann. Section 75-5-101 (1997).

[3] The Montana Department of Environmental Quality has the authority to issue a penalty against a violator equal to $10,000 for each day of each violation with the maximum penalty not to exceed $100,000. Mont. Code Ann Section 75-5-611(9) (1997). A violation may also result in a criminal fine of /$25,000 per day of violation and up to one year imprisonment for the first offense. Mont. Code Ann Section 75-5-632 (1997).

The EPA and the Ninth Circuit erred in failing to examine State water quality regulation in light of its impact on Tribal self-governance or Tribal internal relations. Instead, the Ninth Circuit and the EPA examined the issue in a state regulation vacuum. Without any analysis, the EPA declared and the Ninth Circuit affirmed that nonmember activity threatens the health or welfare of the Tribe. Such analysis ignores the reality of current State regulation. Nonmember activity does not threaten the self-governance or internal relations of the Tribe. State regulation currently addresses all threatening activities cited by Respondents. Because the State regulation of nonmember fee land will prevent any impact to the Tribe, the second exception to *Montana, supra,* does not apply. The Tribe lacks the inherent sovereignty to regulate nonmember fee land.

The appropriate construction of the *Montana, supra,* exception stands as the keystone to jurisdictional Indian Law. The Ninth Circuit misapplied the second exception to the circumvention of the general rule. This Court should issue its Writ of Certiorari and reverse the Ninth Circuit.

B. UNLESS REVIEWED TRIBAL REGULATION UNDER THE CWA LEAVES LOCAL GOVERNMENTS AND THEIR CITIZENS IN UNCERTAINTY.

Congress passed the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by the reduction and eventual elimination of polluting discharges. 33 U.S.C. § 1251(a). CWA

attempts to accomplish its goal by developing a partnership between the federal government and the States. 33 U.S.C. Section 1251(b).

Congress amended the CWA in 1987 with the Water Quality Act of 1987 (hereinafter WQA), P.L. 100-4, 101 Stat. 7. For the first time, the WQA permitted the treatment of Indian Tribes in the same manner as states for certain purposes. CWA Section 518, 33 U.S.C. Section 1377. 59 Fed. Reg. 64, 339 (Dec. 14, 1994). A Tribe that meets the criteria in Section 518(e), 33 U.S.C. § 1377(e) and 40 C.F.R. Section 131.8(a), may submit an application to the EPA. 40 C.F.R. Section 131.8 (1992).

If the EPA recognizes a Tribe as a State, a Tribe can submit its proposed water quality standards to EPA. *City of Albuquerque v. Browner*, 97 F.3d 415, 419 n.4 (10th Cir. 1996). The Tribe must first inventory all of the surface waters within the Reservation. Id. at 6. The Tribe then assigns specific uses to the inventoried waters. Id. Next, the Tribe selects the use classification in order to achieve the Tribe's ideals or desires for the inventoried waters. Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters, 71 North Dakota Law Review 433, 451 (1995). (Hereinafter N.D.L.Rev.) The CWA requires that at a minimum, the Tribe protect "fishable/swimmable " goals. 33 U.S.C. Section 1251(a)(2) (1989). See also EPA WQA Guide.

The Tribe may adopt various use categories and subcategories that the Tribe deems appropriate to the reservation so long as the use categories meet the minimum requirements of the CWA and the purposes of the CWA. EPA WQS Guide at 7. Uses may include typical items like

irrigation and public drinking water supplies, to the less typical items like cultural and religious activities. Tribes may adopt more stringent WQS than the fishable/swimmable goals, however, once adopted, the Tribe cannot downgrade the uses unless the Tribe shows that attainment is not feasible. 40 C.F.R. Section 131.10(g), (h) (1994).

After the Tribe designates its uses, the Tribe must design quality criteria which are designed to protect and attain the designated uses. Id. at Section 131.2. In theory, if polluters comply with the criteria, then the water body should achieve a water quality sufficient to achieve and protect the designated use. 40 C.F.R. Section 131.11(a) (1994).

The Tribe holds a public meeting under tribal law and applicable federal regulations. 33 U.S.C. Section 1313(c)(1) (1988). "EPA urges Tribes to actively involve Tribal members in the review process. Public hearings . . . are an effective means of involving Tribal members in setting goals for their reservation waters . . . " EPA WQS Guide at 13. The Tribe, however, should open the meeting to all persons including non-Indians. 40 C.F.R. Section 131.20(b) (1994).

EPA only reviews a Tribes designated uses and WQS to insure that they are consistent with the CWA and EPA regulations. EPA WQS Guide, *supra,* note 118 at 13. The scientific analysis that formed the WQS must be adequate and the designated uses and criteria must be compatible throughout the water body. Id. at 15. 56 Fed. Reg. 64, 876 & 890 (1991). The CWA and the WQA permits states and Tribes that meet Section 1377(e) standards to set standards that are more stringent than federal standards so as

to force the development of technology. *United States Steel Corp. v. Train*, 556 F.2d 822, 838 (7th Cir.1977).

EPA will respect a Tribe's decision to adopt WQS more stringent than an adjacent state's WQS for the same water body. See 56 Fed. Reg. 64, 876 & 886 (1991). If the Tribe's WQS pose a conflict with the state's WQS, the EPA will not force a Tribe to lower its WQS. Id. See also *City of Albuquerque v. Browner, supra*, at 423-424. Unless there is a showing of inconsistency with the CWA, neither the EPA nor a state may second-guess a Tribe's value judgment as to the uses of reservation waters and the WQS to achieve those uses. *In re Bethlehem Steel Corp.* 58 Op. of EPA General Counsel 337, 338 (1977). 56 Fed. Reg. 64, 876 & 890 (1991). In fact, EPA does not require judicial review for tribal certification because decisions are based on tribal law and not federal law. 56 Fed. Reg. 64, 876 & 882 (1991).

Once the EPA has approved the tribal uses and WQS as being consistent with the CWA, the EPA and the Army Corp of Engineers may only issue permits to point source dischargers of pollutants if they comply with applicable tribal WQS. 33 U.S.C. Section 1341(a)(1) (1994), 1311(b)(1)(C) (1988). 40 C.F.R. Section 124.51(c) (1994). The Tribe has three options when examining an application: (1) the Tribe certifies that the proposed discharge complies with tribal WQS; (2) the Tribe certifies that the proposed discharge will comply with tribal WQS if the permit incorporates additional conditions; (3) the Tribe denies certification. 33 U.S.C. Section 1341(a)(1) (1988).

The EPA and or Army Corp of Engineers have no power to override the Tribe's determination denying or

conditioning certification. *In re Bethlehem Steel Corp., supra.* 56 Fed. Reg. 64, 876 & 890 (1991). If the Tribe denies certification the federal agency may not issue the permit. Id. The applicant can only challenge the Tribe's denial in tribal court subject to tribal law and their judicial review. Id.

Any conditions placed by the Tribe on a permit become federal permit conditions enforceable by EPA under the CWA. 33 U.S.C. Section 1311(a), 1319(c), & (d) (1988). 40 C.F.R. Section 122.41(a), (a)(2) (1994). CWA violations carry civil penalties of $25,000 per day per violation, criminal penalties of $25,000 per day per violation and or imprisonment for a period of one year, and possible permit revocation or termination. Id. 40 C.F.R. Section 122.41(a) (1994). One commentator has stated:

> The mechanics of the certification process encourage (if not require) the dissatisfied applicant to sue the federal agency who incorporated the tribe's conditions in the federal permit, rather than suing the tribe itself. Such litigation will likely fail on general principles of judicial deference to administrative agencies, but perhaps more importantly from the tribe's perspective, will not directly challenge the tribe's regulatory authority over the applicant, nor the wisdom of the tribe's WQS or its conditions.

71 N.D.L.Rev. 433, 463.

The CWA as defined by the Ninth Circuit's ruling throws local governments and nonmembers into an abyss of uncertainty. The CWA permits Tribes to regulate all waters within the reservation. Waters subject to Tribal regulation include low lying areas periodically inundated

by water. *Conservation Council of North Carolina v. Costanzo*, 398 F.Supp. 653, 673 (E.D.N.C. 1975). The Tribe may regulate man-made ponds and marshes. See *Leslie Salt Co. v. United States*, 896 F.2d 354, 359 (9th Cir. 1990). The CWA also sanctions the regulation of unnamed tributaries that only flow into a traditionally navigable stream during heavy rainfalls. *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979).

Unlike the cited cases, the Tribe will designate the wetlands, ponds, and small tributaries subject to regulation. A nonmember can only challenge the designations in Tribal Court subject to Tribal laws.

The Tribe will determine the use of all waters regardless of their location and prior use. Permissible uses may include the protection of culture and religion and other out of the ordinary uses. The Tribe will then set water quality standards in order to meet the uses.

Local governments fear that Tribes may overregulate. The local governments suspect that Tribes may set more stringent WQS than the EPA requirements in order to meet the Tribe's designated uses. In *City of Albuquerque, supra*, the Pueblo Tribe issued arsenic standards 1000 times more stringent than the federal Safe Drinking Water Standard.

> EPA will impose this stringent limit on the City despite the fact that arsenic occurs naturally in Albuquerque's ground water at relatively high levels and is not discharged to the water by industrial polluters. If pure water is discharged at the City's outfall, it is possible that the arsenic levels in water flowing through the Pueblo will remain relatively high. I raise this issue of the

> agency's apparent inconsistency because it is one I find troubling.

City of Albuquerque v. Browner, supra.

The CWA permits Tribes to substantially regulate the activities of nonmembers and local governments. The Tribe may regulate a local government's construction and maintenance of roads, and the construction of bridges. See 33 U.S.C. Section 1344. If the county's bulldozer or road grader causes soil or rock to enter a Tribally defined marsh, then the Tribe may prohibit the construction or maintenance. See *United States v. Lambert*, 915 F.Supp. 797, 802 n. 8 (S.D.W.Va. 1996). See also Id. at 801 n. 7. A Tribe may regulate a private homeowner's landscaping and construction or regulate a farmer's application of fertilizer or herbicides. See *Concerned Residents for Envirn. v. Southview Farm*, 34 F.3d 114, 116 (2nd Cir. 1994). Under the Ninth Circuit's interpretation, the Tribe will regulate all activities using Tribal law in Tribal Court.

Unless this Court reviews this case, the Tribal standards will force local governments to comply with the WQS. Reality dictates that the local governments provide the necessary services to all citizens, Tribal members and nonmembers alike. These services include waste facilities and public water works. Local governments build and maintain roads including the construction of bridges over the waters. These governments must also maintain a welfare department, fund Courts, pay for a county attorney, and several other services. High standards will drive local governments to either increase taxation or reallocate sparse tax dollars from essential services in order to

construct the infrastructure necessary to comply.[4] If this Court later reviews this issue and finds Tribes cannot regulate nonmember fee land, then the local governments will have diverted and wasted substantial tax dollars.

These governments hold a strong interest in regulating the services they provide or having a voice in their regulation. After the Ninth Circuit's decision, the local governments will have no voice in the regulation of any service that impacts Tribally defined water. Despite the fact that Tribal members are citizens of the counties and cities within the reservation and can vote in all elections, nonmembers cannot participate in Tribal politics. The Tribe has the power to cease the construction of bridges and roads, and to close water plants, waste facilities and industries. Despite this power, neither the local governments nor their nonmember citizens can vote to determine the Tribal decision-makers.

Local governments and nonmembers only have a peripheral opportunity to participate. Nonmembers may participate in a public hearing designed for Tribal members under Tribal law. See EPA WQS Guide at 13. This participation has no meaning. The Tribal decision makers

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[4] Albuquerque estimated that it would initially spend $248 million dollars and $26 million annually to comply with the Isleta Pueblo arsenic WQS. The City estimated an additional spending of $70-$100 million for the nitrogen WQS and $60 million to comply with the ammonia WQS. City of Albuquerque's Memorandum in Support of Motion for Summary Judgment at 10-19. *City of Albuquerque v. Browner*, 865 F.Supp. 733 (D.N.M.1993). The City, the Tribe and the EPA have entered an agreement which has delayed the city's compliance. 7 Duke Envtl. L. & Pol'y F.367 (1997) at 13.

must only answer to their Tribal constituents. If Tribal decision makers submit Tribal water quality standards that eliminate an essential service, the Tribal leader need not worry. The Tribal leader stands accountable only to the members of the Tribe.

If the Tribe denies a nonmember their Constitutional rights when reviewing a water matter in Tribal Court, then the nonmember must pursue the denial in Tribal Court under the Indian Civil Rights Act (hereinafter ICRA). 25 U.S.C. Section 1301 et seq.[5] ICRA does not provide a nonmember with the right to a jury of his or her peers. Thus, in all Montana Reservations, a Tribal jury consists of only tribal members. If a nonmember suffers damages, a suit under ICRA may be valueless. The Tribe possesses sovereign immunity. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).

Local governments and nonmembers with fee property, nervously await this Court's decision. The local governments cannot afford to be patient. The decision of this Court will determine the future financial allocations and taxation of the local governments. Immediate review by this Court will at least alleviate some of the uncertainty.

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[5] See *Talton v. Mayes*, 163 U.S. 376, 384 (1896), finding Tribal governments including Tribal Courts are not subject to the United States Constitution. See also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978), holding the Indian Civil Rights Act did not create a federal remedy in a addition to the habeas corpus remedy.

II. THE SOVEREIGN IMMUNITY OF STATE AND LOCAL GOVERNMENTS GENERATE UNWORKABLE RESULTS REQUIRING REVIEW.

In *Montana v. Gilham*, 127 F.3d 897 (9th Cir. 1997) the Court found the principle of sovereign immunity prevented an individual from suing a State in Tribal Court. The Court stated, "It is consistent with the recognition of sovereignty that both tribes and States are immune from unconsented tort actions by individuals in each other's courts." Id. at 904. The Ninth Circuit previously held that absent an act of Congress, consent or waiver, a Tribe may not sue a State in federal court. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1057 (9th Cir. 1997). The state's sovereign immunity extends to its subdivisions including County and in some cases City governments. See *Toombs County v. O'Neal*, 330 S.E.2d 95, 96-97 (Ga.1985). See also *Comm'l Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1015 (Fla.1979). 57 Am.Jur.2d Section 6 (1988).

In this case, the CWA poses a serious problem to any enforcement. Any conflict between a State and a Tribe cannot be resolved without one of the two governments foregoing its sovereign immunity. *Gilham, supra*, 900.

Under the Ninth Circuit's ruling, the Tribe cannot enforce its own regulations against the State, Lake County, or cities and towns. The principle of sovereign immunity prohibits the Tribe from enforcing its water regulations in Tribal Court. Instead, the Tribe must seek shelter under the enforcement wings of the EPA. Relying upon the bureaucratic channels of the EPA diminishes the Tribe's ability to enforce its WQS. Every violation will

require subsequent bureaucratic interpretations before the enforcement mechanism begins. The entire process could lead to a bureaucratic nightmare.

A state or local government cannot challenge in Tribal Court a Tribe's WQS, use designation, or any other decision made under the CWA without foregoing its sovereign immunity. Each time the State or local government considers a challenge to the Tribe, it must weigh the challenge against waiving its sovereign immunity. Such a dilemma strangles the State and local governments' right to participate and infringes upon the traditional notions of Due Process.

Sovereign immunity creates confusion for all entities involved in the Ninth Circuit's decision. This Court should grant Certiorari to resolve the unworkable result.

CONCLUSION

This Court should grant a Writ of Certiorari when the Ninth Circuit erred finding the Tribe possessed the inherent sovereignty to regulate nonmember owned fee land under the CWA. The construction of *Montana, supra,* and its exceptions lies at the nucleus of modern Federal Indian law. The Ninth Circuit ignored this Court's instructions and circumvented the general rule by failing to read the second exception in the context of Tribal self-government and the internal relations of a Tribe.

This Court should also review this case in light of the serious impact Tribal water regulation will have on local

governments and their nonmember citizens. Local governments provide the majority of the services. Unless reviewed, Tribal regulation will force the allocation of local tax dollars toward constructing the infrastructure to comply with the CWA. Local governments fear over-regulation from an entity where they have no voice.

Finally, the principle of sovereign immunity yields an unworkable result under the CWA. The Tribe cannot enforce its regulations against the State and local governments in Tribal Court. The State and local governments cannot challenge a Tribal decision under the CWA without foregoing their sovereign immunity. For these reasons, this Court should grant a Writ of Certiorari.

Respectfully submitted,

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